

## NOTES OF INTEREST AND GUIDANCE (CONT.)

**COUNSEL'S CORNER****Why Can't I Get What I Want?**

However employed within the Navy, each of us needs and uses specific pieces of equipment to perform the tasks that make up our individual job. Except for items of personal convenience and subject to budget constraints, the equipment we need will be purchased with the appropriated funds available to the command to which we are assigned. Most often the need for new items will first be identified by the user, who, after securing the approval to obtain the equipment, will be requested to describe the equipment in a requisition or procurement request document. To do this, we obviously call upon our knowledge of the marketplace. Many times this is limited to our past experience with a single model of a particular manufacturer. Since we have used this make and model equipment with success before, we need not worry about it performing well in the future. Knowing exactly what we want, we write it up and submit it to the procurement office for processing. However, we are often disappointed when the equipment that arrives is not the brand name item we thought we ordered. What went wrong? Did once again the Government pay attention only to the lowest price offered? Feeling frustrated, we are inclined to think "Now I am stuck with something unfamiliar" and wonder "Why can't I just get what I really want?"

The answer stems from the fact that we are initiating the purchase of an asset on behalf of the Navy rather than ourselves. Whether a secretary needing a new typewriter, a lab technician requiring an upgraded microscope or a radiologist lacking an adequate CT scanner, all of us are subject to the legal framework that governs purchases made with taxpayer funds. At the center of this structure is the Competition in Contracting Act of 1984, 10 U.S.C. 2304 and 41 U.S.C. 253, commonly known as "CICA." This statute requires that contract solicitations include specifications that permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the actual minimum needs of the agency. Under the law, the contracting officer must ensure that the specifications describe only what is needed by the Navy, not what may be desired. The contracting officer simply lacks the authority to purchase a Cadillac when a Chevrolet is adequate.

The contracting officer also cannot restrict the Government's consideration to one particular make and model of equipment when other suitable products are available in the commercial market.

This does not mean that we must accept an unsatisfactory item. If, due to special circumstances, only the product of a brand name manufacturer will do the job at hand, eliminating competition and purchasing the brand name article are permissible. There is no legal requirement to buy something that will not work. However, it must be remembered that when competition is restricted in any manner the Government must be able to demonstrate that it had a reasonable basis for its determination that this restriction was necessary to meet its minimum needs. This determination will be recorded in a document called a "Justification and Approval" or J&A. Unless this showing can be made, the acquisition will not withstand a legal challenge.

When dealing with markets involving commercial items, including many types of medical equipment, how can the Government determine which are suitable and which are not? After all, such items are commercially designed and each manufacturer's design probably differs markedly from its competitors. In addition, there will often be differences in size, weight, performance capabilities and other factors. In advance of issuing the solicitation, the Government must develop a set of "salient characteristics." These are the physical, functional or other features that an item must have in order to meet the minimum needs of the Government. Since the user is the one most familiar with the basic requirement, it is likely that the contracting office will call upon him or her to assist in this effort. A common practice is to draft the "salient characteristics" so that they are the mirror image of the technical specifications listed in the marketing literature of the brand name item with which the user is familiar. This practice should be avoided. As "salient characteristics" are by their nature restrictive of competition, they too can be challenged as a violation of CICA. Again, the contracting agency can defeat such a challenge only if it can show that all of the restrictions it imposes are reasonably related to its minimum needs.